No. 88-1162

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1988

MELVIN C. MOORE,

Petitioner,

v.

CITY OF RICHMOND
and
COMMONWEALTH OF VIRGINIA,

Respondents.

ON APPEAL FROM THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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LEVIT & MANN
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A.

Questions Presented for Review

1. Were Melvin Moore's constitutional rights to due process as a public employee violated when he was terminated from his position as head of the City of Richmond Juvenile Detention Center?

2. Was Melvin Moore's lawsuit barred by the doctrine of res judicata?

B.

Parties To The Proceedings

1. The Petitioner is Melvin Moore.

2. The Respondents are the City of Richmond and the Commonwealth of Virginia.

The City of Richmond is represented by William Joe Hoppe, Esquire, Senior Assistant City Attorney, 300 City Hall, 900 East Broad Street, Richmond, Virginia 23219. The Commonwealth of Virginia is represented by Peter R. Messitt, Esquire, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

C.

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E.

This Petition for Writ of Certiorari is sought to request review of the final order of the Supreme Court

of Virginia dated June 1, 1988. A Petition for Rehearing was denied on September 23, 1988.

F.

Statement of Jurisdiction

(i) The date of the judgment of the Supreme Court of Virginia denying the appeal to be reviewed is June 1, 1988.

(ii) The denial of the request for rehearing was dated September 23, 1988.

(iii) The statutory provision which confers jurisdiction on the United States Supreme Court to review the judgment in this case by writ of certiorari is 28 U.S.C. § 2104.

G.

Constitutional Provisions Involved

(i) The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

H.

Statement Of The Case

This case concerns a claim by Melvin Moore, a long time head of the City of Richmond Juvenile Detention Home for compensatory and punitive damages for the wrongful termination of his employment on May 13, 1983.

This suit was filed in the Circuit Court of the City of Richmond, Virginia. In response to the lawsuit the defendants filed various pleas, including a plea of res judicata. This plea was based on the earlier dismissal of a Bill of Complaint filed by Moore on July 7, 1983 in the Circuit Court of the City of Richmond,

Virginia, Case No. G-9396-2, in which Moore requested the issuance of an injunction restoring him to his former employment position. Moore also filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, Civil Action No. 85-0435-R, for injunctive relief. This case was dismissed as being barred by the dismissal of the state action for injunctive relief.

I.

Statement Of The Proceedings

On June 2, 1987, the parties held a hearing before the Honorable Robert L. Harris, Judge of the Circuit Court of the City of Richmond, Virginia. The Court later entered an order on July 13, 1987 dismissing the case holding that the action was barred by the doctrine of res judicata.

Moore appealed the dismissal order to the Virginia Supreme Court. On June 1, 1988, the Virginia Supreme Court dismissed the appeal finding no reversible error.

Moore duly filed a Petition for Rehearing in the Virginia Supreme Court. This Petition for Rehearing was denied on September 23, 1988.

The constitutional claims were first raised in the Motion for Judgment, a copy of which is attached hereto as part of the appendix. The Circuit Court of the City of Richmond did not reach these issues because the plea of res judicata was sustained. The denial of constitutional due process is the basis for Moore's lawsuit asking for an award of compensatory and punitive damages.

J.

Statement of Facts

Melvin Moore was employed as Director of the Juvenile Detention Home for the City of Richmond, Virginia since 1957 for approximately 25 years. He was paid by state and local funds. On April 29, 1983, Moore was advised by the Judges of the Juvenile and Domestic Relations District Court for the City of Richmond that he was suspended from his job for two

weeks. After the two weeks' suspension, his employment was terminated on May 13, 1983. Moore was given no opportunity to contest his termination before an impartial panel or authority. He was only told that he could have a hearing before an appointed judge. A grievance was not provided in the Juvenile Detention Home Personnel Policies. However, he was not considered a City or State employee to pursue his rights under the City of Richmond or State of Virginia grievance procedures.

Prior to his termination, the Juvenile Court judges enacted a personnel policy which adopted the certain provisions of personnel policy for the City of Richmond employees except for the following areas: recruitment, evaluation, vacation, compensatory time, sick leave, holidays, and grievance procedure.

A grievable matter is defined in Virginia Code Section 2.1-114.5:1 as follows:

> A. Definition of grievance - A grievance shall be a complaint or dispute by an employee relating

> to his or her employment, including but not necessarily limited to (i) disciplinary actions, including dismissals, demotions and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application or interpretation of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subsection B (iii) below; (iii) acts of reprisal as the result of utilization of the grievance procedure or of participation in the grievance of another state employee; and (iv) complaints of discrimination on the basis of race, color, creed, political affiliation, age, handicap, national origin or sex.

However, rather than adopting the grievance procedure adopted in the City of Richmond Personnel Manual or provided by state law for state employees, the Juvenile Detention Home policies provided a grievance procedure "through the chain of command." The final authority for the resolution of the grievance rested with the Chief Judge of the Juvenile and Domestic Relations District Court. No right to a pre-termination or post-termination hearing before an

impartial body was provided in the Juvenile Detention Home personnel policy.

After the suspension began, Moore appeared before the three judges of the Richmond Juvenile Court. After the conclusion of this hearing, Moore was terminated on May 13, 1983. When Moore was terminated by the action of the Chief Judge, Moore requested that he be advised of the proper procedure to contest his termination. The Judges did not advise him that he could avail himself of either the grievance procedure by either the State of Virginia or the City of Richmond. Moore was advised that the Judge's decision was final. He was not provided a hearing before the judges responsible for his termination or by any other judicial or administrative body.

K.

Argument

L.

Moore's Due Process Rights As A Public Employee Were Violated When He Was Not Afforded Any Avenue To Contest His Termination.

It is axiomatic that a public employee has a property interest in his continued employment which is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 538 (1972), this Court established the rule that when a public employee has a legitimate claim of entitlement to continued public employment, he possesses a property interest that is protected by the Due Process Clause of the Fourteenth Amendment. This right may be created by statute, written contract or by rules and mutually explicit understandings between the employer and employee. See Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this Court established a balancing test for considering whether a governmental deprivation of a protected property or liberty interest violated due process. In determining whether a violation exists, this Court required the following to be weighed:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This principle of due process was later explained by this Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985): "The question then remains what process is due." 470 U.S. at page 541, 105 S.Ct. at 1493. Loudermill requires at the least that the termination be preceded "by notice and opportunity for hearing

appropriate to the nature of the case." 470 U.S. 542, 105 S.Ct. 1493. As this Court observed:

> We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest". 470 U.S. at 542, 105 S.Ct. at 1493.

Loudermill further required that the hearing procedure be provided by the written administrative procedure:

> We conclude that the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by the ... statute. 470 U.S. at 547-548, 105 S.Ct. 1496.

In reviewing the situation facing Moore, it is clearly evident that his 25-year employment at the Juvenile Detention Home provided him with a substantial interest in his continued employment. However, there existed no grievance procedure for Moore to challenge his termination. The Judges were the force behind his termination, yet there did not exist any remedy to contest his termination. Under the Juvenile Detention Home Personnel policies, there was no means for him

to avail himself of either the grievance procedure provided by the City of Richmond or by the State of Virginia since Moore was not classified as either a City or State employee.

Therefore, it is evident that the personnel policies did not provide Moore with even minimal due process as guaranteed by the Fourteenth Amendment. Moore had no opportunity to contest his termination through the grievance procedure provided to all city and state employees by statute. Without the opportunity to be heard, Moore's constitutional rights have clearly been violated.

II.

Moore's Claim Is Not Barred By Res Judicata.

The defendants claim that this appeal is barred by the doctrine of res judicata. However, the earlier dismissal of the Federal action did not reach any determination of the merits of Moore's claims. His Federal action was dismissed on the grounds that his

prior suit for injunctive relief barred a subsequent action for injunctive relief. This certainly cannot be considered to be res judicata to a later lawsuit for damages. See Hughes v. U.S., 71 U.S. 232, 18 L.Ed. 303 (1866). Likewise, the dismissal in state court is not res judicata because it failed to determine what if any grievance procedure was provided to Moore by the Juvenile Court judges and how he failed to follow any grievance procedures if in fact none existed. These courts have each failed to determine whether the Juvenile Court judges had any statutory authority to exercise administrative control over the detention home and if so did they have the legal obligation to provide the detention home personnel a meaningful grievance procedure to contest terminations or other grievable adverse actions.

The prior actions were brought prior to Moore's termination in an effort to prevent his termination. The second action can correctly be considered as an action for damages based upon his wrongful termination. Therefore, the causes of action in the first and second

suits are not identical and the first action is not a bar to the second action. The Commonwealth of Virginia was not a party to the first action but was properly named a party in the subsequent suit. Therefore, the parties are different and this suit should be permitted to proceed.

Virginia has traditionally adopted the distinction between action for damages and actions for injunctive relief.

The Virginia Supreme Court in the case of Wright v. Castles, 232 Va. 218, 349 S.E.2d 125 (1986), held that an action for injunctive relief is not res judicata to a subsequent law action unless the very matter in controversy in the pending action was decided in the prior suit. The decision sets forth the requirements to bar a subsequent action on the basis of res judicata.

> For res judicata purposes, four elements must concur: (1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made. Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956).

It is clear from a comparison of the two complaints that several of these required elements are lacking:

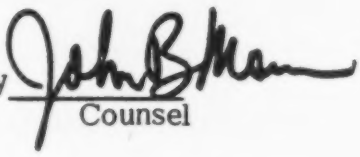
(1) The remedies sought are not identical, and

(2) The parties to the action are not identical.

In Wright, the Virginia Supreme Court cites its decision in Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956) which concerned an employment contract between the plaintiff and the defendants. In Worrie, the Virginia Supreme Court held that while both causes of action concerned the same employment contract, the purposes of the two suits were not identical. Likewise, in this case the chancery suit was brought to enjoin the termination of Moore without cause and without a hearing. The lawsuit for compensatory damages was brought to compensate Moore for his wrongful termination and the violation of his constitutional rights.

Therefore, this lawsuit should not be barred by the doctrine of res judicata and be remanded for trial on the merits.

MELVIN C. MOORE

By 
Counsel

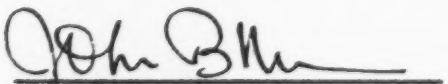
John B. Mann, Esquire
LEVIT & MANN
419 North Boulevard
Richmond, Virginia 23220
(804) 355-7766

FILING AND MAILING CERTIFICATE

I, John B. Mann, hereby certify that on this 21st day of December, 1988, I filed with the Clerk's Office of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

William Joe Hoppe
Senior Assistant City Attorney
300 City Hall
900 East Broad Street
Richmond, Virginia 23219

Peter R. Messitt, Esquire
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219



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419 North Boulevard
Richmond, Virginia 23221

88-1162

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In The Supreme Court Of The United States

OCTOBER TERM, 1988

MELVIN C. MOORE,

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v.

CITY OF RICHMOND
and
COMMONWEALTH OF VIRGINIA,

Respondents.

ON APPEAL FROM THE VIRGINIA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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CITY OF RICHMOND
JUVENILE DETENTION HOME
2100 Mecklenburg Street
Richmond, Virginia 23223

PERSONNEL POLICIES

The personnel manual of the City of Richmond is hereby adopted as the personnel policies for the Detention Home. All of the policies contained therein are applicable with the exception of the following, recruitment, evaluation, vacation and compensatory time, sick leave, holidays and grievance procedures.

The grievance policy for the Detention Home is through the chain of command, i.e., to the next level of authority and the final authority to resolve said grievances is with the Chief Judge of the Juvenile and Domestic Relations District Court.

All grievances or complaints shall be in writing and the response shall be in writing to the aggrieved party. A grievable matter is as defined in the aforesaid personnel manual.

Any questionable portion or areas appearing to be in conflict with regulations (State Standards) or the

State Code, will be subject to the Chief Judge's interpretation in determining its applicability based on the Juvenile Court law.

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

MELVIN C. MOORE,

Plaintiff,

v.

HONORABLE ALTON E. BRYANT, JR.,
Judge, City of Richmond
Juvenile and Domestic Relations
Court
SERVE: William T. Eads
Court Administrator
2000 Mecklenburg Street
Richmond, Virginia 23223

and

CITY OF RICHMOND,

SERVE: Manuel Deese
City Manager
City Hall
Richmond, Virginia 23219,

Defendants.

BILL OF COMPLAINT

Comes now plaintiff Melvin C. Moore, by counsel, and says in this his Bill of Complaint the following:

1. Prior to May 13, 1983 plaintiff was the Superintendent of the City of Richmond Juvenile Detention Home.

2. On that date plaintiff was discharged from such position by defendant Bryant, Chief Judge of the City of Richmond Juvenile and Domestic Relations General District Court.

3. In his capacity as superintendent of the City of Richmond Juvenile Detention Home plaintiff was an employee of the City of Richmond and defendant Bryant was without authority to terminate plaintiff from his employment.

4. The discharge of plaintiff from his employment by defendant Bryant was based upon plaintiff having previously filed a law suit styled Moore v. City of Richmond, Docket No. LF-1706 in the Circuit Court of the City of Richmond, Division I and thus in violation of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Virginia Constitution.

5. Plaintiff as an employee of the City of Richmond was entitled to use the grievance procedure for City of Richmond Employees in regard to his discharge but such right was not afforded to him by defendant Bryant or defendant City of Richmond.

WHEREFORE, plaintiff prays this Court:

A. Declare that plaintiff's rights have been violated as aforesaid.

B. Enjoin the defendants from continuing plaintiff as a discharged employee and restore him to his position with restoration of full back pay and all other job benefits;

C. Alternatively to B, require defendants to grant plaintiff the right to grieve his discharge as an employee of the City of Richmond;

D. Award plaintiff his attorney fees and costs;

E. Award such other and further relief as may be deemed just and proper.

Melvin C. Moore

By_____
Counsel

Robert P. Geary
GEARY & DAVENPORT
2026 East Main Street
Richmond, Virginia 23223

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MELVIN C. MOORE,

Plaintiff,

v. Civil Action No. 85-0435-R

CITY OF RICHMOND, VIRGINIA,
Municipal Corporation and
HONORABLE ALTON E. BRYANT, JR.
in his official capacity as
Judge City of Richmond Juvenile
and Domestic Relations District
Court,

Defendants.

COMPLAINT

Jurisdiction

1. This is an action brought for declaratory and injunctive relief under 42 U.S.C. §1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1343.

Parties

2. Plaintiff is an adult male citizen of the United States of American and of the Commonwealth

of Virginia and a resident of the Richmond, Virginia area.

3. Defendant City of Richmond is a municipal corporation operated under the laws of the Commonwealth of Virginia.

4. Honorable Alton E. Bryant, Jr., is a Judge of the City of Richmond Juvenile and Domestic Relations District Court and all times relevant hereto was acting under the color of state law.

Causes of Action

Count I

5. For many years prior to May 13, 1983, plaintiff was the Superintendent of the City of Richmond Juvenile Detention Home.

6. On that date plaintiff was discharged from his employment in such position by defendant Bryant then the Chief Judge of the City of Richmond Juvenile and Domestic Relations District Court.

7. In his capacity as Superintendent of the City of Richmond Juvenile Detention Home plaintiff was an employee of the City of Richmond and defendant

Bryant was without authority to terminate plaintiff from his employment.

8. As an employee of the City of Richmond, plaintiff was entitled to use the grievance procedure for City of Richmond employees in regard to his discharge, but was not allowed such right by defendant Bryant or defendant City of Richmond.

9. Such action by defendant Bryant and defendant City of Richmond denied to the plaintiff the right of due process of law and equal protection of the law under 42 U.S.C. §1983.

Count II

10. The allegations of paragraph 1 through 6 are repleaded and adopted herein.

11. Any proffered reason given by defendant Bryant for discharging the plaintiff were not the reasons for the discharge but a pretext for defendant Bryant discharging plaintiff because of plaintiff's opposition to the proposed use of vending machine funds, for plaintiff's opposition to meals being prepared by detention home staff for outside functions, for

plaintiff's opposition to personal long distance telephone calls and for plaintiff having previously filed a lawsuit in the Circuit Court of the City of Richmond seeking declaratory judgment as to the employment status of Juvenile Detention Home employees.

12. Such action by defendant Bryant in terminating plaintiff for these reasons denied to plaintiff his rights tc due process of law and denied to plaintiff his rights under the First Amendment of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays this Court:

In regard to Count I -

a. declare that plaintiff's rights have been violated as aforesaid and that he was an employee of the City of Richmond and entitled to use the grievance procedure for City of Richmond employees;

b. enjoin the defendants to grant to plaintiff the right to use the City of Richmond grievance procedures;

c. grant such other and further relief as may be deemed just and proper.

In regard to Count II -

a. to declare that plaintiff's rights have been violated as aforesaid by defendant Bryant;

b. enjoin defendant Bryant from having terminated plaintiff and awarding plaintiff his position as Superintendent with all back pay and other job benefits;

c. grant such other and further relief as may be deemed just and proper.

Melvin C. Moore

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MELVIN C. MOORE	)	
	)	
v.	)	Civil Action No. 85-0435-R
	)	
CITY OF RICHMOND, et al.	)	

OPINION AND ORDER

Plaintiff Moore filed with this Court on 25 April 1985 a complaint under 42 U.S.. § 1983 against the City of Richmond and The Honorable Alton E. Bryant, Jr., a Judge of the City of Richmond Juvenile and Domestic Relations District Court. Jurisdiction is alleged under 28 U.S.C. § 1343. The complaint avers certain misconduct that denies plaintiff of his right of due process under law and equal protection of the law under § 1983 and the First Amendment of the United States Constitution. Defendant Bryant and defendant City of Richmond have both filed motions for dismissal and summary judgment. The motions rely on arguments of lack of subject matter jurisdiction or in the alternative the doctrine of res judicata. Plaintiff has

timely filed a memorandum in opposition to defendant's motion to dismiss.

Plaintiff was before this Court on 13 June 1983 to ask the Court to intervene in certain State matters involving a pending hearing into his eligibility for continued employment within the City of Richmond. The Court found at that time that it lacked subject matter jurisdiction and dismissed without prejudice. Defendant then proceeded in the Virginia State court system with his complaint and the matter received final judgment on 24 January 1985 adverse to him. The Virginia Supreme Court, after reviewing the trial court record and considering the arguments submitted, found no reversible error in the trial Court's decision and refused petition for appeal.

With the exception of alleging violation of 42 U.S.C. § 1983 and the First Amendment of the United States Constitution plaintiff brings the identical matter alleging identical facts and asking for identical relief before this Court as he brought before the Circuit Court of the City of Richmond on 7 July 1983. There

is nothing in the State trial record to indicate that plaintiff reserved his federal rights for federal court nor did he make any mention of reserving his federal rights when he was before this Court on 13 June 1983.

As recently as January of 1984 the Supreme Court has reaffirmed its holding in Allen v. McCurry, 449 U.S. 90, 96 (1980) where it said, "Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effects of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to State-court judgments whenever the courts of the State from which the judgments emerged would do so." Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 896, 79 L.Ed.2d 56, 61, 62 (1984).

In Migra the Supreme Court defined claim preclusion to encompass the law of merger and bar. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that has never been litigated, because of a determination that it should

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have been advanced in an earlier suit." Migra, 104 S.Ct. at 894, 79 L.Ed.2d at 59, fn. 1. Section 1983 claims should be treated as all other federal claims that may be brought in State court. Migra, 104 S.Ct. at 897, 79 L.Ed.2d at 63.

Virginia recognizes five elements in the doctrine of res judicata (claim preclusion). First, that the plaintiff has litigated, or could have litigated, the same claim in another action in a competent jurisdiction. Second, that the parties of the subsequent suit be the same or privy to those in the initial suit. Third, that there be identity of cause of action. Fourth, that the parties involved are in the same "quality or capacity" in both actions. And finally, these criteria fulfilled, a final judgment on the merits of a court of competent jurisdiction will bar any future action in Virginia. Ferebee v. Hungate, 63 S.E.2d 761, 764 (Va. 19851).

Bates v. Devers, 202 S.E.2d 917, 920 (Va. 1974), recognizes "[r]es judicata-bar [as] the particular effect commonly meant by use of the term 'res judicata.' A valid, personal judgment on the merits in favor of

defendant bars relitigation of the same causes of action, or any part thereof which could have been litigated, between the same parties and their privies." [footnote omitted] [emphasis in original]

Finding that plaintiff could have raised his § 1983 and First amendment complaint in State court, that he did fully litigate the cause of action he now brings, that the cause was litigated in a court of competent jurisdiction, and that plaintiff has received a valid final judgment, I apply Virginia's res judicata-bar law as instructed by the United States Congress and Supreme Court and DISMISS the case against both defendants.

Case is DISMISSED.

And it is so ORDERED.

/s/ D. Dortch Warriner
United States District Judge

Date: 10 July 1985

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

MELVIN C. MOORE,

Plaintiff,

v.

CITY OF RICHMOND
Serve: Robert Bobb,
City Manager
City of Richmond
900 East Broad Street
Richmond, VA 23219

and

COMMONWEALTH OF VIRGINIA:
Serve: Mary Sue Terry,
Attorney General
Attorney's General Office
101 North Eighth Street
Richmond, VA 23219

Defendants.

MOTION FOR JUDGMENT

Comes now plaintiff, Melvin C. Moore, and moves for judgment against the above named parties, jointly and severally, in the amount and for the reasons stated below.

1. Plaintiff was from 1958 through May 13, 1983 the Superintendent of the City of Richmond Juvenile Detention Home, a subgovernmental unit of

the Commonwealth of Virginia and the City of Richmond.

2. On May 13, 1983 a Judge of the Juvenile and Domestic Relations Court, acting without authority and outside the scope of his authority terminated plaintiff's employment.

3. Thereafter the Judges of the Juvenile and Domestic Relations Court of the City of Richmond took all steps necessary to insure that plaintiff was strickened from the payroll of the defendants. To this end the Judges:

a. Denied plaintiff's right to pursue a grievance through the City of Richmond's personnel system.

b. Denied plaintiff's right to pursue a grievance through the Commonwealth of Virginia's personnel system.

c. Conducted a hearing in which they the Judges, as interested parties, presided.

4. As a result of these acts and practices

the plaintiff was improperly terminated.

5. The defendants acquiesced in these acts and practices and removed plaintiff from their payroll.

6. As a result the plaintiff has been without employment since 1983.

WHEREFORE, plaintiff prays that the court award plaintiff damages in the amount of $80,000.00 compensatory damages and $100,000.00 in losses of future earnings.

Respectfully submitted,

MELVIN C. MOORE

_____

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

MELVIN C. MOORE,

Plaintiff,

v.

CITY OF RICHMOND and
COMMONWEALTH OF VIRGINIA,

Defendants.

SPECIAL PLEA OF SOVEREIGN IMMUNITY

Defendant, Commonwealth of Virginia, by counsel, for its special plea to the Motion for Judgment filed against it, respectfully states as follows:

1. This case is barred as to this defendant by doctrine of sovereign immunity which bars tort actions against the Commonwealth of Virginia unless they are filed in strict accordance with the Virginia Tort Claims Act, § 8.01-195.1 through .9.

2. The motion for judgment does not recite that it is filed pursuant to the Virginia Tort Claims Act and it does not comply with the Act

21)

and because the Act covers only state employees acting within the scope of their employment. Further, this action is barred by the provisions of § 8.01-195.3(3) which excludes claims based upon an Act of any court.

3. Insofar as the motion for judgment may sound in contract, it is barred by sovereign immunity due to plaintiff's failure to comply with the jurisdictional requirements of Virginia Code §§ 2.1-223.1 et seq. and 8.01-193.

WHEREFORE, the motion for judgment should be dismissed and the Commonwealth of Virginia awarded its costs.

PLEA OF STATUTE OF LIMITATIONS

Comes now the defendant, Commonwealth of Virginia, by counsel, and for its plea to the motion for judgment filed herein says the cause of action set forth therein, if costrued to sound in tort, did not accrue to Plaintiff at any time within the two years next preceding the commencement of this action and is therefore

barred by the applicable Statue of Limitations.

The cause of action set forth in the motion for judgment, if construed to sound in contract, did not accrue to plaintiff at any time within the three years next preceeding the commencement of this action and is therefore barred by the applicable Statute of Limitations.

WHEREFORE, the motion for judgment should be dismissed and the Commonwealth awarded its costs.

PLEA OF RES JUDICATA

Defendant, Commonwealth of Virginia, by counsel, for its plea of res judicata, respectfully states as follows:

1. Plaintiff may not maintain this action because on July 7, 1983 plaintiff filed a Bill of Complaint in the Circuit Court for the City of Richmond, Virginia against Judge Alton E. Bryant, Jr. and the City of Richmond, Case No. G-9396-2. Plaintiff alleged that Judge Bryant discharged

him but that Judge Bryant was without authority to terminate his employment. Plaintiff also alleged that he was denied the right to use the grievance procedure for employees of the City of Richmond. The court dismissed plaintiff's suit on the ground that plaintiff failed to produce evidence that he ever instituted a grievance proceeding.

Plaintiff filed an action in the United States District Court for the Eastern District of Virginia, C.A.No. 85-0435-R on April 25, 1985, in which he raised the same matters as were involved in Case No. 6-9396-2 and are involved in the present action. The court dismissed plaintiff's suit on the ground that the action was barred by the doctrine of res judicata.

WHEREFORE, defendant prays that the matters in issue in this suit have already been adjudicated and prays that this action be dismissed.

COMMONWEALTH OF VIRGINIA

By: _____

Mary Sue Terry
Attorney General of Virginia

James T. Moore, III
Senior Assistant Attorney General

Peter R. Messitt
Assistant Attorney General

Office of the Attorney General
101 N. 8th Street
Richmond, Virginia 23219
(804) 786-1129

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

MELVIN C. MOORE,

Plaintiff

v. LK 2265-2

CITY OF RICHMOND, et al,

Defendants.

ORDER

On June 2, 1987, came the parties, by counsel, on the defendant City of Richmond's Demurrer, Special Plea of the Statute of Limitations, and Special Plea of Res Judicata and further on the admissions made by plaintiff and filed herein on said date; and the matter was argued by counsel before the court.

UPON CONSIDERATION WHEREOF, the court finding that all matters asserted in the motion for judgment filed herein against the defendants have been or could have been raised by plaintiff in the actions that he previously filed in this court and in the Federal District Court against defen-

dant and that these previous actions resulted in final judgments entered in favor of this defendant, this action is accordingly barred by the doctrine of res judicata and dismissed with prejudice as to the City of Richmond and as to the Commonwealth of Virginia.

Since this ruling of the court disposes of this action against the City of Richmond and against the Commonwealth of Virginia, the court does not reach herein the matters raised in the Demurrer or the Plea of the Statute of Limitations.

The objection of the plaintiff to the action of the court is noted.

ENTER: 7-13-87

_____

Judge

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

MELVIN C. MOORE Appellant,

against Record No. 871135
Circuit Court No. 87-1663

City of Richmond, et al., Appellees.

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

MELVIN C. MOORE, Appellant,

against Record No. 871135
Circuit Court No. 87-1663

City of Richmond, et al., Appellees

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of June, 1988 and grant a hearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Melvin C. Moore, Appellant,

against Record No. 871135
Circuit Court No. 87-1663

City of Richmond, et al., Appellees.

From the Circuit Court of the City of Richmond

Upon consideration of the motion of Melvin C. Moore, in proper person, it is ordered that issuance of the mandate in this case be and the same hereby is deferred to and including the 22nd day of December, 1988, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

A Copy,

Teste:

Clerk

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 10th day of January, 1989, I filed with the Clerk's Office of the United States Supreme Court the foregoing Appendix to Petition for Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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OPPOSITION

BRIEF

(3)

NO. 88-1162

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN C. MOORE,

Petitioner,

v.

CITY OF RICHMOND
and
COMMONWEALTH OF VIRGINIA,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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7 pp

QUESTION PRESENTED

Should this Court review a decision of the Virginia Supreme Court which was based solely upon state law?

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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN C. MOORE,

Petitioner,

v.

CITY OF RICHMOND
and
COMMONWEALTH OF VIRGINIA,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On July 7, 1983 petitioner filed a Bill of Complaint in the Circuit Court for the City of Richmond, Virginia. Petitioner alleged that he was discharged from his employment without authority and that he was denied the right to pursue a grievance to challenge his discharge. Petitioner's case was tried on January 24, 1984. The Circuit Court for the City of Richmond struck petitioner's evidence and entered judgment for the defendants because there was no evidence that petitioner had ever attempted to use the grievance procedure. Petitioner sought to appeal this decision to the Virginia Supreme Court. On January 10, 1985 the Virginia Supreme Court refused the petition for appeal because there was no reversible error in the judgment.

On April 25, 1985 petitioner filed an action in the United States District Court for the Eastern District of Virginia. Petitioner alleged that his employment was terminated without authority and that he was denied the right to pursue a grievance to challenge his discharge. On July 10, 1985 the U.S. District Court for the Eastern District of Virginia dismissed the case on the ground that the petitioner had fully litigated the same cause

of action in state court and therefore the action was barred by the doctrine of *res judicata*. App. at 17. Petitioner's appeal of this judgment was denied and the judgment was affirmed by the Fourth Circuit Court of Appeals on April 24, 1986.

Petitioner then filed the present action on September 30, 1986 in the Circuit Court for the City of Richmond, Virginia. Again, petitioner alleged that his employment was terminated without authority and that he was denied the right to pursue a grievance. On July 13, 1987 the Circuit Court for the City of Richmond found that the matters asserted had already been raised in the actions previously filed in state court and in the federal district court. Therefore, the court ruled that the action was barred by the doctrine of *res judicata*. App. at 26-27. The *res judicata* bar was the sole basis for the court's order dismissing this action. The court did not address petitioner's federal due process claim.

On June 1, 1988 the Virginia Supreme Court rendered the judgment complained of in this case. The Court held that there was no error in the judgment of the circuit court and that therefore the petition for appeal would be denied. App. at 28.

ARGUMENT

The Virginia Supreme Court did not reach the federal question the petitioner now asks this Court to review. The Virginia Supreme Court affirmed the circuit court's ruling that petitioner's cause of action was barred by the doctrine of *res judicata* because petitioner had previously asserted the same claim in courts of competent jurisdiction. Therefore, the court affirmed the dismissal of petitioner's case without reaching the due process claim. In fact, petitioner acknowledges that the state court did not reach the federal question in this case. "The Circuit Court for the City of Richmond did not reach [the constitutional claims] because the plea of *res judicata* was sustained." Petition at 7.

There can be no review by this Court if the state court has decided the case exclusively on state law grounds. In *McCoy v. Shaw*, 277 U.S. 302 (1928), the petitioner brought suit in equity in state court to enjoin the collection of a tax. The lower court dismissed the suit on the ground that the petitioner had an adequate remedy at law. This Court stated that "[i]t is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this Court. . . ." 277 U.S. at 303. The Court held that it was without

authority to determine the federal right claimed by the petitioner and the Court dismissed the writ of certiorari for lack of jurisdiction.

The decision in this case is based solely upon Virginia's doctrine of *res judicata*. The case was dismissed because petitioner previously filed the same case in both state and federal court. Notwithstanding petitioner's request that this Court review the correctness of the Virginia Supreme Court's application of the *res judicata* bar, a decision by the state court of last resort on a question of state law is binding on this Court. *Gasquet v. LaPeyre*, 242 U.S. 367 (1917).

CONCLUSION

The decision of the Virginia Supreme Court was based solely on Virginia law. The petition for certiorari should be denied.

Respectfully submitted,

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